

1996

# State of Utah v. Raymond Perez : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 960375-CA

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

v.

RAYMOND PEREZ,

Defendant/Appellant.

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BRIEF OF APPELLANT

Case No. 960375-CA

Priority No. 2

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BRIEF OF APPELLANT

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Appeal from a Conviction of  
One Count Distribution of a Controlled  
Substance Within a 1000' of a Prohibited  
Place, a Second Degree Felony and One Count  
of Distribution of a Controlled Substance,  
a Third Degree Felony by a Jury Empaneled  
by the Honorable Michael J. Glasmann,  
Second District Court Judge

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**FILED**

Utah Court of Appeals

JAN 15 1997

Ms. Lynn M. Branch

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STATE OF UTAH,

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\* BRIEF OF APPELLANT

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\* Case No. 960375-CA

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\* Priority No. 2

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**JURISDICTION AND NATURE OF PROCEEDING**

This appeal is from a jury verdict finding the Appellant guilty of one count of Distribution of a Controlled Substance within 1000 feet of a prohibited place, a Second Degree Felony, and one count of Distribution of a Controlled Substance, a Third Degree Felony. The appellant was tried before a jury, in the Second District Court of Weber County on the 25th and 26th days of March, 1996, the Honorable Michael J. Glasmann presiding.

On April 17, 1996, the Appellant was sentenced to serve a term of one to fifteen years, and a term of zero to five years. The terms were ordered to run concurrent to each other and were ordered to be served at the Utah State Prison. Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. § 78-2a-3(2)(f) (1953 as amended) and Rule 26 of the Utah Rules of Criminal Procedure.

STATEMENT OF ISSUES ON APPEAL  
AND STANDARD OF REVIEW

POINT I

The Court committed plain error when it allowed the State to bolster their confidential informant's credibility before his credibility had been attacked by the Defense.

Standard of Review

Generally, issues not raised before the trial court are waived and cannot thereafter be raised on appeal. However, Utah's appellate courts have evidenced a willingness to hear and rule on issues raised for the first time on appeal if the trial court committed plain error or the case involved exceptional circumstances. State v. Cook, 881 P.2d 913, 246 Ut. Adv. Rep. 26 (Ct. App. 1994)

POINT II

The Appellant's trial attorney acted so deficiently that it denied the Appellant his constitutional right to effective assistance of counsel.

Standard of Review

Where ineffective assistance of Counsel is raised for the first time on appeal, the Appellate Court must determine as a matter of law whether the Defendant was denied effective assistance of counsel. State v. Callahan 866 P 2d 590 (Utah App 1993)

## CONSTITUTIONAL PROVISIONS, STATUTES & RULES

U.S. CONSTITUTION AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONSTITUTION AMEND. XIV, SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTION ART. 1, SECTION 7: No person shall be deprived of life, liberty, or property, without due process of law.

UTAH CONSTITUTION ART. 1 SECTION 12: In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusations against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

### Rule 608, Utah Rules of Evidence

(a) Opinion and reputation of character. The credibility of a witness may be attacked or supported by evidence in the form



of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

#### STATEMENT OF THE CASE

The Defendant was charged with Distribution of a Controlled Substance with an enhancement for being within 1000 feet of a church, a second degree felony, and one count of Distribution of a Controlled Substance, a third degree felony. The Defendant was found guilty of the charges after a jury trial, and was sentenced to serve a term of one to fifteen years and a term of zero to five years at the Utah State Prison. Both sentences were ordered to be served concurrent to each other.

The charges arose out of two transactions made with a confidential informant, Adam Black. During the State's opening statements and during direct examination of its witnesses, the State continually bolstered Mr. Black's credibility. The Defendant had not attacked Mr. Black's credibility, and the State's intentional and improper bolstering of its witnesses gave undue credit to their testimony.

#### STATEMENT OF THE FACTS

The Defendant, Raymond Perez, was charged by information, with one count of distribution of a controlled substance within 1000 feet of a church, a second degree felony, and one count of distribution of a controlled substance, a third degree felony. (T.

4-5) Mr. Perez plead not guilty to the charges, and a jury trial was held.

The Defendant's trial proceeded on March 25, 1996. During the State's opening argument and during its case in chief, the Prosecuting attorney, William F. Daines, continually bolstered the confidential informants credibility. (T. 66-68, 92-94, 216-17, 236)

The charges against Mr. Perez arose out of two transactions using Adam Black as a confidential informant. Mr. Black was an ex-convict who claimed that he had met the Defendant in prison. (T. 233) When Mr. Black was released from prison, he began contacting his parole officer regarding people who he thought were violating their parole. (T. 92, 236) Based upon Mr. Black's information, several arrests and convictions were obtained. (T. 94-6, 98) The State took special care to point out to the jury that Mr. Black's information to his parole officer was instrumental in bringing down several known criminals. In fact, the State was quite proud of the fact that Blake Woodring, Mr. Black's parole officer, earned a medal of merit for the convictions he made using information Mr. Black had provided him. (T. 93) At Mr. Woodring's suggestion, Mr. Black, applied to be a confidential informant. (T. 95) Mr. Black was eventually cleared through the Board of Pardons and Department of Corrections to do undercover work. (T. 95) He then made several controlled buys of controlled substances with the Adult Probation and Parole officers and the Weber-Morgan Strike Force. (T. 100-01)

On October 30, 1995 and November 13, 1995, Mr. Black allegedly acted as a confidential informant in two controlled buys from the Defendant. (T. 104) The October 30, 1995 controlled buy was conducted at the Defendant's apartment complex, and the November 13, 1995 controlled buy was conducted at the Red-Duck, a convenience store where Adam Black was an employee at the time. (T. 107) Based upon Mr. Black's testimony regarding these two buys, the Defendant was arrested, charged, and eventually convicted.

During opening statements, the State's prosecuting attorney, Mr. Daines bolstered Mr. Black's testimony by relaying information to the jury that Mr. Black had been involved in several cases that turned out fruitful. (T. 66-68) The Prosecutor also solicited information from his own witnesses which implied an indicia of reliability on the part of Mr. Black's other cases. (T. 64-65) Even though the confidential informant had not taken the witness stand, and his credibility had not been attacked, Mr. Daines was allowed to bolster the informant's credibility using specific facts that the informant had assisted in the arrest and conviction of other defendants. This entire line of questioning by the State was allowed by the trial court and by Defense counsel without objection. (T. 65)

The jury found the Defendant guilty of Distribution of a Controlled substance within 1000 feet of a church, and distribution of a controlled substance. Mr. Perez was sentenced to serve one term of one to fifteen years and a term of zero to five years at the Utah State Prison.

## SUMMARY OF ARGUMENT

POINT I     The Court committed plain error when it allowed the State to bolster their confidential informant's credibility before his credibility had been attacked by the Defense.

Rule 608 of the Utah Rules of Evidence prohibits testimony or evidence regarding the truthfulness of a witness unless the credibility of that witness has been attacked. Recently in State v. Hovater, the Utah Supreme Court held that this exact type of bolstering of a witnesses was improper. Judge Michael J. Glasmann, the presiding judge in this case, was the presiding judge in Hovater. Mr. Daines, the prosecutor in this case, was also the same prosecutor in Hovater. Five days after the Supreme Court issued its opinion in Hovater warning Mr. Daines that this very conduct was improper, he intentionally bolstered Mr. Black's testimony, using the same type of improper evidence that he used in Hovater, and before Mr. Black's testimony had been attacked. Both Mr. Daines, and Judge Glasmann knew, or should have known that Mr. Daines bolstering of the confidential informant was improper. This improper bolstering was clear error. It should have been obvious to the trial court, and was unduly prejudicial to the outcome of the trial.

POINT II The Appellant's trial attorney acted so deficiently that it denied the Appellant his constitutional right to effective assistance of counsel.

Both the United States Constitution and the Utah Constitution guarantee all persons charged with a criminal offense the right to the effective assistance of counsel. Despite this constitutionally mandated right, the Appellant was denied effective assistance of counsel when his attorney: (1) failed to properly prepare for trial; (2) failed to raise or argue a proper defense at trial; and (3) failed to object to clearly inadmissible and prejudicial testimony.

Standing alone, each of Trial counsel's omissions demonstrate a substandard performance, so deficient that it fell below any reasonable objective standard of professional judgment, and but for the obvious lack of effective assistance, the outcome of the Appellant's trial would have been different.

### ARGUMENT

#### POINT I

THE TRIAL COURT COMMITTED "PLAIN ERROR"  
WHEN IT ALLOWED THE STATE TO BOLSTER  
THEIR CONFIDENTIAL INFORMANT'S CREDIBILITY  
BEFORE HIS CREDIBILITY HAD BEEN  
ATTACKED BY THE DEFENSE

The improper bolstering of the confidential informant's credibility was not raised in the trial court and normally it would not be considered by the Appellate court. However, this Court has held that:

Utah's appellate courts have evidenced a willingness to hear and rule on issues raised for the first time on appeal if the trial court committed plain error or the case involved exceptional circumstances.

State v. Cook, 881 P.2d 913, 246 Ut. Adv. Rep. 26 (Ct. App. 1994) (citations omitted)

The Appellant contends that plain error existed in this case which warrants this Court's review. In order to establish plain the Appellant must show; 1) an error existed, 2) that the error should have been obvious to the trial court, and 3) that the error was harmful. State v. Dunn, 850 P.2d 1201 (Utah 1993).

In the case at bar, the prosecuting attorney improperly bolstered the confidential informant's credibility, by the use of inadmissible testimony. The improper bolstering of the witness was in direct violation of Rule 608 of the Utah Rules of Evidence which states:

(a) Opinion and reputation of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The Supreme Court of Utah recently examined these exact same set of circumstances in State v. Hovater<sup>1</sup>, 914 P.2d 37, 286 Utah Adv. Rep. 41 (March 20, 1996). In Hovater, the Supreme Court found that Mr. Daines' bolstering evidence was admissible "Only after the

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<sup>1</sup> It should be noted that Hovater was an appeal from the Second District Court of Weber County. Judge Michael J. Glasmann was the Presiding Judge, and William F. Daines was the prosecuting attorney.

character of the witness has been attacked by opinion or reputation evidence or otherwise", State v. Hovater, 914 P.2d 37, 286 Utah Adv. Rep. 41 quoting United States v. Cruz, 805 F.2d 1464, 1480 (11th Cir. 1986). The Court went on further to warn Mr. Daines that bolstering by the use of specific instances of conduct of a witness may not be proved by extrinsic evidence. Hovater, at 292, citing Rule 608(b), Utah Rules of Evidence.

In this case, the Defense did not attack Mr. Black's credibility, before the State bolstered his testimony. Mr. Daines started bolstering Mr. Black's credibility in his opening statement:

"Blake Woodring asked him [confidential informant] about the last of the matters, who is this guy? Can you help us with him? With no agreement for him to be an undercover [a]gent or anything, he simply gave the parole department the information about this person from Oregon who was passing bad checks. As it turns out, he is a person who was wanted in three different states, and has been convicted of 11 separate counts of forgery in three different states. And ended up getting Blake Woodring a medal from the Department of Corrections over his assistance in catching this guy. That's how the Parole Department found out about him".... (T. 66)

"...You cannot use a parolee as an undercover agent just on the decision of a parole agent. It is prohibited by the Corrections Department. But because of all of the information that Adam Black kept giving the Parole Department, and because of the fact that all of this information was turning out to be good information, Blake Woodring applied to the administrative offices in Salt Lake To permit Adam Black to work undercover." (emphasis added) (T. 67)

This type of opening statement is in direct violation of Hovater, and Rule 608. It was an intentional move by the State to bolster Mr. Black's credibility, and it can not be dismissed by this Court as harmless error. In giving an opening statement, the State should "give the jury an unargumentative version of the facts the party intends to prove." State v. Lafferty, 749 P.2d 1239.

These comments by the prosecutor went directly to the weight of Mr. Black's testimony. They were replete with highly prejudicial and inadmissible information about the Appellant, and were clearly intended to prove that Adam Black was a truthful person. Mr. Daines' actions were done in complete disregard of Rule 608 of the Utah Rules of Evidence, even after being warned by the Supreme Court in Hovater only five days earlier.

This error should have been even more obvious to the trial court. Not only was Mr. Daines' actions in direct violation of Rule 608, but Judge Glasmann was the presiding Judge in Hovater, and he knew or should have known about the Supreme Court's admonishment published five days earlier. The State cannot claim that they did not know they were in error. It should have been obvious to them that an error existed.

Even if this Court finds that Mr. Daines' opening statements did not trigger the credibility factor of Rule 608, the State again questioned its first witness regarding Mr. Black's truthfulness. Mr. Blake Woodring, an Adult Probation and Parole Officer, was called to testify regarding Mr. Black's involvement in other cases. The following exchange occurred:

Q: In January, though, of 1995, did your relationship with Mr. Black change?

A: Yes.

Q: Describe for the Jury what happened in that time?

A: In January of 1995 Mr. Black came into my office. He informed me at that time that he had a person staying with him off and on who was a parole fugitive and probation fugitive. He was a parole fugitive from the State of Oregon and probation fugitive from Salt Lake



City. He was cashing forged checks at that time. He stated that this individual had shown him how he was doing it, and was cashing checks now in the Ogden area.

He was aware that Mr.--that the individual's name was Raymond Lindbrick, had done about ten checks here in the Ogden area. One of those checks he was able to obtain a brand new Toyota Corolla. Mr. Black gave me information where he was hanging out, the various drug houses he was going to purchase substances.

Based upon the information Mr. Black provided to me, I was able to do surveillance and find the individual. Followed his vehicle, pulled it over, and took him into custody. And confiscated evidence that led to convictions in the States of Washington, Oregon and Utah.

Q: Did you receive any award for that?

A: Yes, I did. I received a medal of merit provided by the Department of Corrections. (T. 92-93)

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Q: All right. Now after January of 1995 when this information was given to you, did Adam Black continue to give you information?

A: He did. Mr. Black has a unique ability to talk to people and gain their trust. Over the next few months he would let me know--he would come and ask me if certain individuals were on the run, if they were fugitives from justice, and provided me information on various fugitives in the Ogden area.

Q: Did that information turn out to be correct or incorrect insofar as you were able to check it?

A: The majority of the time it was correct information. Usually--at that time they had started the NUCAT, the Northern Utah Criminal Apprehension Team.

Q: You better tell the Jury what that is, just very quickly.

A: It is run by the F.B.I. An enforcement agency made up of officers from the various agencies in the Weber-Davis County areas. And their main job is to chase fugitives that are on the run on probation and parole and failure to appear in court.

Q: And was that information that he was giving you leading to the capture of people?

A: O[h] some occasions, yes. The other occasions it didn't materialize.

Q: Did you ever find he wasn't telling the truth?

A: No, I found his statements to be true. (T. 93-94)

There is no doubt that the State committed an intentional error and that it should have been obvious to the trial court. The error was extremely prejudicial to Mr. Perez. Mr. Black was an ex-convict and his conviction was for burglary. The Defendant was not in a position where he had to attack Mr. Black's credibility. The State willingly offered that Mr. Black was a parolee who was on parole for burglaries. The mere fact that he was a parolee would have given him less credibility in the eyes of the jury. Had the State not bolstered his entire testimony and his character as a truthful person, the jury had reason to question Mr. Black's version of the events involving the Defendant.

Even after the testimony of Mr. Woodring was admitted, the State continued to bolster Mr. Black's credibility through another witness, Rodney Laplant. Mr. Laplant, an Adult Probation and Parole officer, testified that Mr. Black's subsequent information on other defendants produced convictions. Mr. Laplant testified during direct examination as follows:

Q: And have you had any more to do with Adam Black as pertains to this defendant since that day?

A: Well, with Adam, yes. I have dealt with Adam. I have also dealt with Ray up to the point he went back to the prison.

Q: Okay. You didn't make any more buys from him after that insofar as you know?

A: As far as I know, there was one additional buy, but the clarity there is, you know--

Q: Did you continue to work with Adam?

A: Yes.

Q: How many different cases[s]?

A: Numerous different cases.

Q: How many different times did you go along like you have described on these two cases?

A: Just about every one of them. I think I only missed two or three, maybe not even that many. I mean I was there on--I was one of the controlling officers through the whole thing.

Q: And Adam did a lot of people?

A: Yes, he did.

Q: Is that fair?

A: Yeah, he did. He did a lot of people. Not just in that one area, but he did numerous people in Ogden.

Q: And many of them are now in prison?

A: Yes. (T. 216-17)

This line of questioning as well as the line of questioning of Mr. Woodring was for the sole purpose of making the confidential informant out as a truthful person. This type of questioning is clearly prohibited under Rule 608(b) and should have been obvious to the trial court. This Court should review this case on a plain error analysis even absent the objections by defense counsel to the improper bolstering of the confidential informant. The improper bolstering existed, was obvious, and cannot be said to have been harmless.

## POINT II

### THE APPELLANT'S ATTORNEY ACTED SO DEFICIENTLY THAT IT DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Should this Court fail to reach the Appellant's claim on a "plain error" analysis, the Court can still find that the Defendant's trial attorney was ineffective. Both the United States Constitution and the Utah Constitution guarantee persons charged with a criminal offense the right to effective assistance of counsel to assist in their defense. See U.S. Const. Amend. VI; U.S. Const. Amend. XIV, Section 1; Utah Const. Art. 1, Section 7; Utah Const. Art. 1, Section 12; See also Strickland v. Washington, 466 U.S. at 667 at 697, 104 S.Ct. 2052 (1984); State v. Templin, 805 P.2d 182 (1990). The Appellant was denied this fundamental constitutionally guaranteed right and, therefore, the trial court's verdict and judgment must be reversed.

The appellant was denied any resemblance of effective assistance of counsel, in that trial counsel failed to object to the blatant bolstering of the confidential informant's truthfulness. The testimony offered by the State was in direct violation of Rule 608 of the Utah Rules of Evidence. There is no logical reason to not object to the State's actions, and trial counsel's failure to object can not be considered trial strategy. As the Supreme Court stated in Hovater:

"This [testimony regarding other arrests, charges and convictions] was extrinsic evidence offered to support the credibility of another witness in clear violation of rule 608(b). As such, the testimony was improper. And since the evidence had no conceivable beneficial value to

Hovater, the failure to object to it cannot be excused as trial strategy"

No evidence was ever given that there were in fact other persons who were charged with crimes by way of Adam Black's leads. The prosecutor did not present any evidence to support the opinion or observances of Mr. Woodring or Mr. Laplant. These statements were given simply to bolster the later testimony of Adam Black. This type of testimony was in direct violation of Rule 608(a) of the Utah Rules of Evidence. Trial counsel failed to even object to the offering of this testimony.

No attack was ever made on the confidential informants truthfulness prior the State's bolstering. Mr. Daines started to bolster Mr. Black's credibility in his opening statement, before the Defense could have attacked his credibility. When Mr. Woodring testified, the State did not wait for re-direct to bolster Mr. Black's testimony. The State simply asked Mr. Woodring to testify to the veracity of a witness who had not yet been called. The statements offered by Mr. Woodring were given specifically to enhance the credibility of the testimony that Adam Black was expected to give, and to show the purported reputation of Mr. Black.

In State v. Humphries, 818 P.2d 1027, 171 Utah Adv. Rep. 6 (Utah 1991) the Supreme Court looked at the issue of a Defense attorney remaining silent at a crucial point when an obvious error was being committed by the prosecutor. In Humphries the Court stated:

No sound course of trial strategy could dictate defense counsel to be silent at such a crucial time. We conclude that there was reasonable likelihood of a result more favorable to defendant if his trial counsel had not remained silent.

This too, was a crucial point in the trial. Defense counsel allowed the prosecutor to discredit the Defendant by bolstering the State's witness. No objection was made by defense counsel, thereby allowing more weight to be added to Mr. Black's testimony.

This error by defense counsel was very prejudicial to the Defendant. In essence, the jury was allowed to consider very damaging testimony that was clearly inadmissible and which went to the very issue of the Defendant's defense, that defense being that he did not sell drugs to the informant. Mr. Black was an ex-convict. The State readily handed that information to the jury. That fact alone could have caused the jury to doubt Mr. Black's testimony. On at least one of the alleged buys with the Appellant, Mr. Black was the only person in direct contact with Mr. Perez. Had the State not bolstered the Black's truthfulness, the jury would have been left with only the word of an ex-convict to convict Mr. Perez. Had trial counsel properly objected, the statements about Mr. Perez's prior criminal history and Mr. Black's prior work with police officers would not have paraded before the jury.

To successfully assert a claim of ineffective assistance of counsel, the Appellant must show that (1) his counsel's performance was objectively deficient, and (2) that there exists a reasonable probability that but for his counsel's deficient conduct, the verdict would have been more favorable to the defendant. State v.

Cummins, 198 Utah Advanced Reports Court of Appeals, August 25, 1992; State v. Templin, 805 P.2d 182, 186 (Utah 1990) The second prong of Strickland requires that there is a reasonable likelihood of a more favorable outcome for the Defendant, but for the actions of counsel.

There is no doubt that trial counsel failed to object to the inappropriate behavior of the prosecutor, and that omission clearly constituted ineffective representation. The first prong of the Strickland test has been met.

The inadmissible testimony that was allowed, without objection, regarding the confidential informant's credibility gave undue weight to the confidential informant testimony. Absent this information, the jury was left with only the word of an ex-convict. In light of the lack of corroborating evidence on at least one of the convictions, this Court must find that there exists a reasonable likelihood that the jury would not have believed the testimony offered by Adam Black.

#### CONCLUSION

In reviewing the record, this Court should address this case under a plain error standard. The trial Judge and the Prosecuting Attorney were both privy to the opinion in Hovater, and should have been aware that Mr. Daines' actions were inappropriate. Mr. Daines had, or should have had, full knowledge that bolstering of the witness was inappropriate. Further, this Court must find that Mr. Perez was prejudiced by the State's intentional and inappropriate line of questioning.

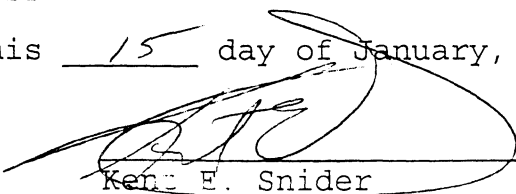
The prejudice Mr. Perez suffered as a result of the inappropriate actions of Mr. Daines dictates that the Appellant's convictions reversed in order to afford the Appellant a fair and impartial trial.

This Court should also find that the Defendant was denied his Constitutional right to effective assistance of counsel. Trial counsel's deficient performance should be viewed in light of the Strickland/Templin two prong test, with any doubt as to the prejudicial effect of trial counsel's acts being resolved in the favor of the defendant. State v. Knight, 734 P.2d 913, 921 (Utah 1987) (Where defendant makes credible argument of an impaired defense, the burden shifts to the State to prove no likelihood of a different outcome).

This Court must not look at each individual incident or an omission upon review. They must consider the cumulative effect of the assigned errors and consider the over all prejudicial affect as to the Appellant's rights to a fair and impartial trial. State v. Ellis, 748 P.2d 188 (Utah 1987); State v. Rammel, 721 2.2d 498, 501-02 (Utah 1986).

Looking at the totality of the ineffective representation, it is obvious that the defendant was denied his right to a fair trial. For all the foregoing reasons, this Court must vacate the trial court's verdict and grant the appellant a new trial in this matter.

RESPECTFULLY SUBMITTED this 15 day of January, 1997.

  
Kent E. Snider  
Attorney for Appellant

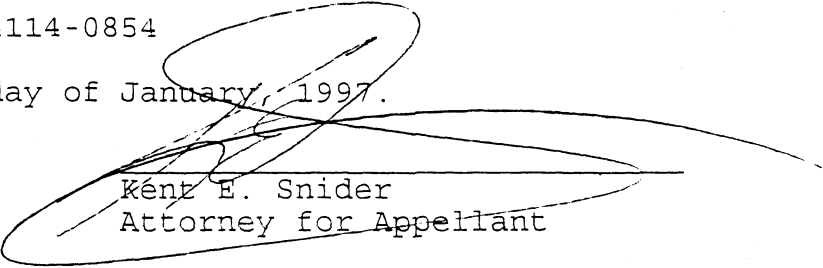


CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief to the following:

Attorney General's Office  
ATTN: Criminal Appeals  
160 East 300 South, 6th floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

DATED this 15 day of January, 1997.



Kent E. Snider  
Attorney for Appellant

# ADDENDUM

1 (January 3, 1996)

2  
3 THE COURT: Go to item 2 on the calendar, the State  
4 of Utah vs. Raymond Perez, case 1128. He is also on for  
5 arraignment.

6 MR. LAKER: I anticipate a not guilty plea on that  
7 matter, your Honor.

8 THE COURT: Okay. I note two felony charges. Let's  
9 go ahead with the reading of each of those.

10 (Informations read by the Clerk.)

11 THE COURT: Thank you. You are Raymond Perez?

12 MR. PEREZ: Yes.

13 THE COURT: Is your date of birth May 12, 1963?

14 MR. PEREZ: Yes, it is.

15 THE COURT: Do you understand what you have been  
16 charged with?

17 MR. PEREZ: (Nods head.)

18 THE COURT: Do you have copies of the Informations,  
19 Mr. Laker?

20 MR. LAKER: I do, your Honor.

21 THE COURT: Mr. Perez, as to Count 1, a second  
22 degree felony distribution of a controlled substance, to wit  
23 marijuana, within a thousand feet of a church, how do you  
24 plead?

25 MR. PEREZ: Not guilty.

1 THE COURT: As to Count 2 a third degree felony  
2 distribution of a controlled substance marijuana, how do you  
3 plead?  
4 MR. PEREZ: Not guilty.  
5 THE COURT: All right. We need to set these matters  
6 for trial. How long do you anticipate the trial will take?  
7 MR. LAKER: I think a day probably.  
8 THE COURT: Who is prosecuting it?  
9 MR. DAROCZI: Mr. Daines, your Honor.  
10 THE COURT: What about the 27th of February?  
11 MR. DAROCZI: That would be a double set for Mr.  
12 Daines, your Honor.  
13 THE COURT: What about the 1st of March?  
14 MR. DAROCZI: The 1st of March would also be a  
15 double set.  
16 THE COURT: Okay. What about the 4th of March?  
17 MR. DAROCZI: That's already double set. So this  
18 would be triple.  
19 THE COURT: What about the 27th of February, or did  
20 I ask you that?  
21 MR. DAROCZI: Yes, you did. That would be a double  
22 set.  
23 THE COURT: What about the 26th of February?  
24 MR. DAROCZI: The 26th of February is good, your  
25 Honor.

1 any questions before we take the break?

2 All right. We will be in recess for 15 minutes.

3 (Recess taken.)

4 THE COURT: Let our record show that we are back in  
5 session. All the members of the Jury are present. Members of  
6 the Jury, I might indicate during the course of the trial we  
7 get into procedural questions that causes delays. We don't  
8 say a five minute recess and make it 35 minutes without  
9 letting you know what happened. That is what happened in this  
10 case. Are we ready to proceed at this time?

11 MR. DAINES: Yes, your Honor, we are.

12 THE COURT: The State ready to make an opening  
13 statement?

14 MR. DAINES: We are, yes, your Honor.

15 THE COURT: Go ahead.

16 MR. DAINES: Thank you, your Honor.

17 Ladies and Gentlemen of the Jury, this is the time the  
18 State has the opportunity to make an opening statement to tell  
19 you what the case is about. The Judge will instruct you that  
20 this is not evidence. What I would like you to do, however,  
21 is see if the opening statement conforms to what you hear from  
22 the witness stand.

23 During the course of this trial while we are going on in  
24 this building, as you can see already, there are fairly small  
25 quarters out here. This is a small courthouse and it will not

1 be unusual for me or my witnesses to run into one of you. If  
2 we appear to be avoiding you like the plague, that's because  
3 we are supposed to be doing that. That has nothing to do with  
4 what we think about you. And during the course of the  
5 proceedings here there will be times that we will take breaks  
6 during the middle of the day. There is only one door in and  
7 out of here, so please just look upon it that way, and we will  
8 try to move through it as quickly as we can so we will get you  
9 out as quickly as we can.

10 In January of 1995 a young man by the name of Adam Black,  
11 who was the undercover agent in this case, was on parole out  
12 of the Utah State Prison to a parole officer by the name of  
13 Blake Woodring who works here in Ogden right across the street  
14 in the State Building for the Adult Parole and Probation  
15 department. He went to him and he said, look, I am out on  
16 parole. I am working up the street at the Red Duck. The Red  
17 Duck, for those of you who may not know where this particular  
18 Red Duck is, is on the corner of Adams and 26th Street. It  
19 kind of sits on the hill. It isn't on the street. And it  
20 sits kitty-cornered to the edge of Adams and 26th Street.

21 He said I am up in this store. A lot of people are  
22 beginning to approach me and doing various things and offering  
23 to sell me stolen property, offering to sell me drugs. And by  
24 the way, there is some guy up there running around right now  
25 who I think is trying to palm forged checks off on me.

1 Blake Woodring asked him about the last of the matters,  
2 who is this guy? Can you help us with him? With no agreement  
3 for him to be an undercover gent or anything, he simply gave  
4 the parole department the information about this person from  
5 Oregon who was passing bad checks. As it turns out, he is a  
6 person who was wanted in three different states, and has been  
7 convicted of 11 separate counts of forgery in three different  
8 states. And ended up getting Blake Woodring a medal from the  
9 Department of Corrections over his assistance in catching this  
10 guy. That's how the Parole Department found out about him.

11 And then subsequently, or after that, the Weber-Morgan  
12 Narcotics Strike force became acquainted with Adam Black's  
13 ability as an undercover agent. Adam Black has been in  
14 prison. He was in prison with this Defendant. And that's how  
15 he knows this Defendant. It happens that this Defendant was  
16 living in an apartment right next door to the Red Duck when  
17 Adam Black was working there. That's how this case arises.

18 But before the case arose, Adam, who happens to come from  
19 a little bit different background than some of the street  
20 kids, he comes from a very wealthy family. Although he gets  
21 none of the money himself, his father is extremely wealthy in  
22 the State of Texas. And that was known when he was in prison.  
23 So if you are wondering why would all of these people come to  
24 Adam Black, he has the reputation of at least coming from a  
25 family with a lot of money, although Adam doesn't get any of

1 it.

2 And he was in prison. When he came out of prison, he  
3 began seeing people with whom he had been in prison. And he  
4 started dropping by Blake Woodring's office and giving him  
5 information. You cannot use a parolee as an undercover agent  
6 just on the decision of a parole agent. It is prohibited by  
7 the Corrections Department. But because of all of the  
8 information that Adam Black kept giving the Parole Department,  
9 and because of the fact that all of this information was  
10 turning out to be good information, Blake Woodring applied to  
11 the administrative offices in Salt Lake to permit Adam Black  
12 to work undercover.

13 Now Adam Black requested absolutely nothing of the Parole  
14 Department to this point, to the point that he had been giving  
15 all of this information, including the guy from Oregon, had  
16 asked for absolutely nothing. Blake Woodring said to Adam, I  
17 am going to apply to let you be an undercover agent because of  
18 all of the information that you seem to be able to get. And  
19 all of the information that you may be able to get in the  
20 future. But you will not do this for nothing. We don't have  
21 agents work for nothing. So if you go to work as an  
22 undercover agent for us, we will pay off. And this is  
23 basically the agreement they have with him, \$195.00 in  
24 restitution that he still owed on the burglary that he had  
25 gone to prison on. Plus he will get money for gas, because



1 during all of the period of time that he bought for the  
2 narcotics agents, and he bought for some time, made a lot of  
3 buys for them, he used his own automobile. So he got gas  
4 money for that. And then they knew as soon as they started  
5 arresting these people that he would no longer obviously be  
6 able to work at the Red Duck. So he would be given relocation  
7 money.

8 That was the basic arrangement that he made. But it  
9 wasn't even an arrangement he had asked to make. He hadn't  
10 even asked for that much. Blake Woodring said if you are  
11 going to work, that's what would happen.

12 As the Defendant--I mean as Adam Black then was working  
13 at the Red Duck, he would be approached by various people.  
14 There is an apartment complex which sits on the hill right  
15 above the Red Duck, which is known as 2560 Adams. But if you  
16 drive down Porter, the little half street that basically goes  
17 in front of the old Deseret Gym, comes in and tees on 25th  
18 Street right at Deseret Gym, if you drive back there the  
19 apartment also sits back in there. So it has been thought of  
20 also as 2650 Porter. Porter is the name of that street.

21 The Defendant was living in that place on--in October of  
22 1995 when Adam Black, who was approved by the Department of  
23 Corrections to work undercover, was then assigned to Lyle  
24 Bayless, the Deputy who you see seated here at counsel table,  
25 for him to be the controlling person over this agent. And

1           A     Mr. Black has never had a positive urine sample.

2           Q     All right. Now in January of 1995--I assume that  
3 your relationship with Mr. Black between October of '94 and  
4 January of '95 was the standard parole officer?

5           A     He was on I.S.P. which is intensive supervision,  
6 which requires more home visits, more office visits. And he  
7 was on that for a period of six months when he was first  
8 released.

9           Q     In January, though, of 1995, did your relationship  
10 with Mr. Black change?

11          A     Yes.

12          Q     Describe for the Jury what happened in that time?

13          A     In January of 1995 Mr. Black came into my office.  
14 He informed me at that time that he had a person staying with  
15 him off and on who was a parole fugitive and probation  
16 fugitive. He was a parole fugitive from the State of Oregon  
17 and probation fugitive from Salt Lake City. He was cashing  
18 forged checks at that time. He stated that this individual  
19 had shown him how he was doing it, and was cashing checks now  
20 in the Ogden area.

21                He was aware that Mr.--that the individual's name was  
22 Raymond Lindbrick, had done about ten checks here in the Ogden  
23 area. One of those checks he was able to obtain a brand new  
24 Toyota Corolla. Mr. Black gave me information where he was  
25 hanging out, the various drug houses he was going to to

1 purchase substances.

2 Based upon the information Mr. Black provided to me, I  
3 was able to do surveillance and find the individual. Followed  
4 his vehicle, pulled it over, and took him into custody. And  
5 confiscated evidence that led to convictions in the States of  
6 Washington, Oregon and Utah.

7 Q Did you receive any award for that?

8 A Yes, I did. I received a medal of merit provided by  
9 the Department of Corrections.

10 Q Now so the Jury knows, and some of them might know,  
11 you are a category 1 police officer?

12 A I am.

13 Q Parole and probation supervising officers in Utah  
14 are peace officers?

15 A The majority of them are.

16 Q Okay. And you were in that position, is that  
17 correct?

18 A Uh-huh. I finished the Police Academy in December  
19 of '94.

20 Q So much of what you do is basically police work?

21 A Correct.

22 Q In supervising these people.

23 A That's right.

24 Q All right. Now after January of 1995 when this  
25 information was given to you, did Adam Black continue to give

1 you information?

2 A He did. Mr. Black has a unique ability to talk to  
3 people and gain their trust. Over the next few months he  
4 would let me know--he would come and ask me if certain  
5 individuals were on the run, if they were fugitives from  
6 justice, and provided me information on various fugitives in  
7 the Ogden area.

8 Q Did that information turn out to be correct or  
9 incorrect insofar as you were able to check it?

10 A The majority of the time it was correct information.  
11 Usually--at that time they had started the NUCAT, the Northern  
12 Utah Criminal Apprehension Team.

13 Q You better tell the Jury what that is, just very  
14 quickly.

15 A It is run by the F.B.I. An enforcement agency made  
16 up of officers from the various agencies in the Weber-Davis  
17 County areas. And their main job is to chase fugitives that  
18 are on the run on probation and parole and failure to appear  
19 in court.

20 Q And was that information that he was giving you  
21 leading to the capture of people?

22 A Oh some occasions, yes. The other occasions it  
23 didn't materialize.

24 Q Did you ever find he wasn't telling the truth?

25 A No, I found his statements to be true.

1           Q     Now after having been through this with Mr. Black  
2 for a period of time--can a parolee be an undercover agent  
3 under the regulations of the department of probation?

4           A     Yes, they can.

5           Q     How does a parolee become an undercover agent?

6           A     The first thing they are to do, they come into the  
7 office and fill out various paper work which informs them  
8 exactly what the definition of entrapment is. They have to  
9 sign various agreements that they will never act as a peace  
10 officer. They are only there for our assistance. And at that  
11 point, after the paper work is all signed, I have to do a memo  
12 recommending him as a confidential informant. It is then sent  
13 to the Board of Pardons and Department of Corrections  
14 administrative office to be approved.

15          Q     And did you do that with Mr. Black?

16          A     I did.

17          Q     Why did you do that with Mr. Black?

18          A     Mr. Black would come into my office--he had started  
19 employment in the store on 26th Street here called the Red  
20 Duck. And during the course of his employment he had numerous  
21 people who were on parole and probation coming in offering to  
22 sell him stolen property, illegal drugs, and other items.

23          Q     Why would somebody come in and offer to sell Adam  
24 Black stolen property?

25          A     I think probably the main reason is Adam Black's

1 father is quite wealthy. A lot of people have that  
2 information. His father helped subsidize his income so he  
3 could have an apartment all by himself. Most people on parole  
4 can't afford their own apartment so they have roommates, where  
5 Adam had his own apartment and things. So they knew he had a  
6 lot of money, knew he was on parole. And I believe that was  
7 the reason.

8 Q All right. Now did he give you the names of  
9 individuals who were coming in and offering him--offering to  
10 sell him drugs and stolen property?

11 A He did.

12 Q Did you know any of those individuals?

13 A Yes, quite a few.

14 Q In what capacity did you know those individuals?

15 A From my work as a probation-parole officer.

16 Q Now calling your attention to the Defendant seated  
17 here at counsel table, were you acquainted with him in October  
18 of 1995?

19 A I was. I was his supervising parole officer at that  
20 time.

21 Q For what period of time had you been his supervising  
22 parole officer?

23 A The exact date, I am not sure. But I believe it was  
24 in May of 1995. He was moved up from regular parole to  
25 intensive supervision parole, and I became his parole officer

1 at that time.

2 Q All right. Now during the period of time--you have  
3 indicated before to the Jury that an intensive supervision  
4 parole officer has more visits with people.

5 A That's right.

6 Q Describe what you do on intensive supervision.

7 A The main thing is they have a curfew. They have a  
8 7:00 o'clock curfew for the first two months of intensive  
9 supervision. We do a lot of home visits to make sure they are  
10 actually home at 7:00 p.m. We go to their house usually  
11 around 7:00. A lot of times we will double back and make sure  
12 they are home at 9:30 before we go home at the end of the  
13 night. They are required to submit more urine samples. They  
14 are required to report to the office more. If they become  
15 unemployed, they have to report daily until they are employed  
16 again.

17 Q Did you know this Defendant?

18 A I have.

19 Q By talking to him?

20 A Yes, I know Rick.

21 Q Do you specifically know his voice?

22 A I do.

23 Q Have you spoken with him on the phone on numerous  
24 occasions?

25 A I have spoken to him on the phone. I also, when I

1 first started in the Department of Corrections, I worked in  
2 the Halfway House. And I was acquainted with Mr. Perez at the  
3 Halfway House.

4 Q Are you confident you can recognize his voice on a  
5 wire or over the telephone?

6 A Yes, I am.

7 Q Okay. Was his one of the names being given to you  
8 by Adam Black?

9 A It was.

10 Q And so the Jury has some idea, how many people are  
11 we talking about who Adam Black has mentioned to you during  
12 this period of time?

13 A Approximately 10 people.

14 Q All right. Now calling your attention then to the  
15 time that you got Mr. Black situated as an undercover agent--  
16 they gave you permission for that?

17 A Uh-huh.

18 Q Do you know when that was?

19 A I believe it was in August of 1995.

20 Q What did you do with him after you got permission to  
21 use him as an undercover agent? First of all, what did he  
22 want as an undercover agent?

23 A Mr. Black really did not want anything. He had told  
24 me earlier that he just wanted to do it because he was tired  
25 of seeing other people on parole coming in and getting away



1 discussed, we discussed approximately ten names, and some of  
2 them were really good names to do. I told him he would have  
3 to relocate after this was all said and done. I said perhaps  
4 when it is said and done you can get some help from the Strike  
5 force with relocation.

6 Q Moving somewhere else?

7 A Yes.

8 Q Why would you be worried about that?

9 A For his safety.

10 Q All right. you know these people?

11 A The majority of them I knew, not all of them.

12 Q And were these people that you felt capable of being  
13 a danger to Mr. Black?

14 A Yes.

15 Q All right. Now after he became an undercover agent,  
16 to whom was he assigned?

17 A Adam Black?

18 Q Yes.

19 A Well, he still remained under my jurisdiction, a  
20 parole officer, at that point, once he was approved. Then I  
21 had to go to the Weber-Morgan Strike Force and arrange to have  
22 him work with an agent there.

23 Q And what agent did you have him work with?

24 A Lyle Bayless.

25 Q That's the individual seated at counsel table, is

1 that correct?

2 A Correct.

3 Q All right. And they then began doing various  
4 things?

5 A That's correct.

6 Q All right. Now I would like you to--while the  
7 Defendant was on parole in the month of October, 1995, did you  
8 know where he lived?

9 A I do.

10 Q Where did he live at that time?

11 A He lived at--I would have to pull out the file to  
12 know the exact address. Twenty five something Adams,  
13 apartment number 4.

14 Q Calling your attention to--before I call your  
15 attention to this, however, I would ask you has Adam Black  
16 ever shown you the apartment that he went in to buy from this  
17 Defendant?

18 A He has.

19 Q All right. He has actually pointed it out to you?

20 A Correct.

21 Q What apartment did he point out to you?

22 A Apartment number 4.

23 Q Okay. Calling your attention to what has been  
24 marked State's Proposed Exhibit S-3, I ask you if you  
25 recognize this?

1 where Adam Black worked?

2 A That's where he was employed, yes.

3 Q All right. Had you on numerous occasions been to

4 apartment number 4 at 25--I believe it is 2560 or 2550 Adams?

5 A I have. Raymond lived in number 5 for a while right

6 next to 4. But I have been to both of those apartments.

7 Q Calling your attention to--well, before I get to

8 that date, in between August of '95 and the 29th of October of

9 1995, had you been involved in making cases with Adam Black?

10 A I had not. We received approval from the Department

11 of Corrections and then from the Board of Pardons. Then we

12 had to get with the Strike Force and arrange to have an agent

13 assigned. To my knowledge, I think the first day Adam started

14 being used as a confidential informant by the Strike Force was

15 October 30th, I believe.

16 Q All right. Now, did you work with him after October

17 30?

18 A I did.

19 Q And approximately how many different cases, against

20 how many different people did he make cases?

21 A Approximately ten.

22 Q All right. And that was while you worked with him?

23 A Uh-huh.

24 Q Were you always out with him when he was buying if

25 you could be?

1 Q Were you in town on the 13th of November, 1995?

2 A Yes, I was.

3 Q On that date was there an arrangement made for Adam  
4 Black to buy narcotics from this defendant?

5 A There was an arrangement made.

6 Q Where was the arrangement made?

7 A I received contact from Agent Bayless who said Lyle  
8 had just called him and an arrangement had been made to--for  
9 Raymond Perez to come to Adam's work and sell him some--

10 Q Now Adam was working in the Red Duck, S-6?

11 A Yes, correct.

12 Q Because of that you would sometimes have the problem  
13 of his--these arrangements, you would have to move quickly on  
14 it, is that a fair statement?

15 A That's correct.

16 Q People would come in the Red Duck. You would get a  
17 call from Adam, and you would have to rush off?

18 A That's correct.

19 Q Did that happen on more than one occasion with you?

20 A Yes, it did.

21 Q Okay. The nature of his job here in the Red Duck--

22 A Yes, I mean people would come in. There were some  
23 individuals that we had targeted that we didn't ever get to.  
24 But we still did about 10 people, because there would be some  
25 people coming in wanting to sell him drugs. And they were

1 monitoring the bug and paying attention to Adam. That was  
2 specifically--that's what he was doing.

3 Q Okay. Now were you there when--did Lyle eventually  
4 get to that store?

5 A Yes, he did.

6 Q And did you see Lyle go in there?

7 A I did see Lyle go in.

8 Q Did you have any more to do with this case on that  
9 day?

10 A No.

11 Q And have you had any more to do with Adam Black as  
12 pertains to this defendant since that day?

13 A Well, with Adam, yes. I have dealt with Adam. I  
14 have also dealt with Ray up to the point he went back to the  
15 prison.

16 Q Okay. You didn't make any more buys from him after  
17 that insofar as you know?

18 A As far as I know, there was one additional buy, but  
19 the clarity there is, you know--

20 Q Did you continue to work Adam?

21 A Yes.

22 Q How many different casess?

23 A Numerous different cases.

24 Q How many different times did you go along like you  
25 have described on these two cases?

1           A     Just about every one of them. I think I only missed  
2 two or three, maybe not even that many. I mean I was there  
3 on--I was one of the controlling officers through the whole  
4 thing.

5           Q     And Adam did a lot of people?

6           A     Yes, he did.

7           Q     Is that fair?

8           A     Yeah, he did. He did a lot of people. Not just in  
9 that one area, but he did numerous people in Ogden.

10          Q     And many of them are now in prison?

11          A     Yes.

12               MR. DAINES: Thank you, nothing further.

13               THE COURT: Cross.

14               MR. MILES: Thank you.

15 CROSS-EXAMINATION

16 BY MR. MILES:

17          Q     Mr. Laplant, you indicated that through your fault,  
18 or whatever, no report was prepared, no notes were taken, that  
19 type of thing, is that correct?

20          A     That's correct.

21          Q     Why--tell me again why on something like this you  
22 don't--obviously it is numerous months since this occurred.  
23 wouldn't it be helpful to have a report or some notes to refer  
24 to?

25          A     It would be very helpful.

1 A I have three second degree burglaries.

2 Q Did that all take place on the same day?

3 A Yes.

4 Q So your entire record is one day?

5 A Yes.

6 Q Your entire criminal record is one day?

7 A Yes.

8 Q You have no other record?

9 A No.

10 Q All right. And how well did you know this Defendant

11 while you were in the Utah State Prison?

12 A Not that well.

13 Q You weren't friends with him?

14 A No.

15 Q All right. But you were acquainted?

16 A Yes.

17 Q Did you have any trouble with him in the prison that

18 you remember?

19 A No.

20 Q All right. When were you paroled?

21 A In 1994, September 27th.

22 Q Do you remember if you were assigned a parole

23 officer once you were paroled?

24 A No, I was--I went to the Halfway House.

25 Q Which Halfway House?

1           A     No.

2           Q     Do you use drugs?

3           A     No.

4           Q     All right. The--in January of 1995, do you remember

5 where you were living, Adam?

6           A     Yes, on 2526 Adams Avenue.

7           Q     And what--and where is that in relation to 2560

8 Adams where the Defendant lived in October?

9           A     Right two houses away.

10          Q     All right. And did you know the Defendant at that

11 time in January of 1995?

12          A     No.

13          Q     I mean when I say that, you knew him from prison?

14          A     Yes.

15          Q     Had you seen him around right at that time?

16          A     No.

17          Q     Okay. Did you give some information to Blake

18 Woodring about another person at that time?

19          A     Yes, I have.

20          Q     And do you remember that person's name?

21          A     No, I don't.

22          Q     But that resulted in his arrest?

23          A     Yes.

24          Q     How did you know that other person?

25          A     The guy that forged the checks?